

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the matter of)	
)	File No. EB-02-LA-278
Time Warner Entertainment – Advance/Newhouse)	
Subsidiary, LLC d/b/a Time Warner Cable)	NAL/Acct. No. 200332900002
3701 N. Sillect Avenue)	
Bakersfield, California 93308)	FRN: 0007-9355-62

FORFEITURE ORDER

Adopted: June 9, 2004**Released: June 14, 2004**

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this *Forfeiture Order* (“*Order*”), we issue a monetary forfeiture in the amount of six thousand six hundred dollars (\$6,600) to Time Warner Entertainment – Advance/Newhouse Subsidiary, LLC d/b/a Time Warner Cable (“TWEAN”), owner of a cable television system serving Bakersfield, California, for its apparent willful and repeated violation of Section 76.1700(a) of the Commission’s Rules (“Rules”).¹ The violation involves failure to maintain all required material in the system’s public inspection file.

II. BACKGROUND

2. On July 30, 2002, an agent from the Commission’s Los Angeles, California Field Office (“Los Angeles Office”) inspected the TWEAN cable system located in Bakersfield, California.² TWEAN’s Bakersfield system serves more than 5000 customers. The agent’s inspection revealed that the public inspection file was missing required material. The file did not contain the required commercial records on children’s programs after 2000; it did not contain the required proof of performance test data from the fall/winter of 2001 or the spring of 2002; and did not include any of the required signal leakage log and repair records since the second quarter of 2001. In addition, the public inspection file did not contain a statement of the operators’ interest in video programming.

3. On December 30, 2002, the District Director of the Los Angeles Office issued a *Notice of Apparent Liability for Forfeiture* (“NAL”) for a monetary forfeiture in the amount of ten thousand dollars (\$10,000) to TWEAN finding the alleged violations to be willful and repeated.³ TWEAN filed a response to the NAL on January 29, 2003. In its response, TWEAN reported that it had moved its offices shortly before to the agent’s inspection. It argued that the alleged violation occurred as a result of inadvertent oversight due to temporary chaos resulting from the move and the “mistaken belief that the files had been

¹ 47 C.F.R. § 76.1700(a).

² FCC Physical System Identification Number (“PSID”) 004341, Community Unit Identification Number (“CUID”) CA0143. The NAL incorrectly stated TWEAN’s CUID as CA0173 and the PSID as 004343.

³ *Notice of Apparent Liability for Forfeiture*, NAL/Acct. No. 200332900002, (Enf. Bur., Los Angeles Office, released Dec. 30, 2002).

substantially complete prior to the move.”⁴ TWEAN stated that an inventory was done after issuance of the NAL to ensure the records are now complete, that only a “handful” of files were missing, and that no actual harm was done because no one requested to view the public inspection file during the time in question.

III. DISCUSSION

4. The proposed forfeiture amount in this case was assessed in accordance with Section 503(b) of the Communications Act of 1934, as amended (“Act”),⁵ Section 1.80 of the Rules,⁶ and *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines* (“Policy Statement”).⁷ In examining TWEAN’s response to the NAL, Section 503(b) of the Act requires that the Commission take into account the nature, circumstances, extent, and gravity of the alleged violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.⁸

5. Section 76.1700(a) of the Rules requires that the operator of every cable television system having 5000 or more subscribers shall maintain for public inspection a file containing a copy of all records which are required to be kept by certain Rules including: Sections 76.1703 (commercial records for children’s programming), 76.1704 (proof of performance test data), 76.1706 (signal leakage logs and repair records) of the Rules.⁹ The Los Angeles Office agent found that TWEAN had not updated required children’s program commercial records since 2000, that it had not provided proof of performance test data from the winter of 2001 or the spring of 2002, and that it did not include any of the required signal leakage log and repair records since the second quarter of 2001.¹⁰ TWEAN concedes that its records were not complete even prior to its move. Accordingly, we conclude that TWEAN willfully¹¹ and repeatedly¹² violated Section 76.1700(a) the Rules.

6. TWEAN seeks cancellation or reduction of the forfeiture because it had moved its offices prior to the inspection by the agent from the Los Angeles Office, and states that it was still unpacking and reorganizing its files. TWEAN also argues, however, that its failure to have complete records was inadvertent due to a temporarily chaotic situation. We are not persuaded that the move, by itself, was

⁴ TWEAN Response at page 7.

⁵ 47 U.S.C. § 503(b).

⁶ 47 C.F.R. § 1.80

⁷ 12 FCC Rcd. 17087 (1997), *recon. denied*, 15 FCC Rcd. 303 (1999).

⁸ 47 U.S.C. § 503(b)(2)(D).

⁹ 47 U.S.C. §§ 76.1703, 76.1704, and 76.1706.

¹⁰ In addition, the agent found that the public inspection file did not contain a statement of the operator’s interest in video programming, in violation of 47 C.F.R. § 76.1710. However, the NAL was based only on the Section 76.1700 violations.

¹¹ Section 312(f)(1) of the Act, 47 U.S.C. § 312(f)(1), which applies to violations for which forfeitures are assessed under Section 503(b) of the Act, provides that “[t]he term ‘willful,’ ... means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this Act or any rule or regulation of the Commission authorized by this Act” *Southern California Broadcasting Co.*, 6 FCC Rcd 4387 (1991).

¹² As provided by 47 U.S.C. § 312(f)(2), “[t]he term ‘repeated’, when used with reference to the commission or omission of any act, means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day.” The *Conference Report* for Section 312(f)(2) indicates that Congress intended to apply this definition to Section 503 of the Act as well as Section 312. See H.R. Rep. 97th Cong. 2d Sess. 51 (1982). *Southern California Broadcasting Co.*, *supra*.

responsible for TWEAN's failure to have a complete public inspection file. We find, as discussed below, that with one exception, TWEAN effectively concedes its files were not complete either prior to the move or after the move prior to the Los Angeles Office agent's inspection. Therefore, we conclude that the violation is not based on a temporary chaotic situation related to the move.¹³ Moreover, the fact that no member of the public requested access to the files is not a basis for reduction of a forfeiture.¹⁴

7. TWEAN argues that its situation is analogous to that in *Telemedia Broadcasting, Inc. and Rappahannock River Broadcasting LLC*,¹⁵ where the licensee was admonished for failure to provide a complete public inspection file to a visitor who requested it during station remodeling. We find TWEAN's situation is clearly distinguishable because in *Telemedia*, the individual responsible for maintaining the public inspection file affirmatively attested that the station had, at all times, a complete public inspection file, despite the confusion that existed at the time of the visitor's request. In the instant case, neither an officer of the company nor the individual responsible for maintaining the public inspection file has provided a declaration.

8. The Verwey Declaration references an internal audit conducted at an unspecified time prior to TWEAN's office move.¹⁶ With regard to the result of this audit, neither an officer, nor the individual responsible for ensuring that the public inspection file is complete, nor an individual responsible for conducting the audit, has provided a declaration that the public inspection file was found to be complete. Instead, TWEAN provides a declaration by an Executive Assistant of the company who merely "assists in maintaining" the file and who is only able to say that she "had no reason to believe" that the public inspection file "was not substantially complete."¹⁷ This is not equivalent to an affirmative declaration that the public inspection file was complete by either an officer of the company or by the individual with primary responsibility for maintaining the file. Accordingly, we conclude that TWEAN effectively concedes that its public inspection file was not complete before its move, or after the move prior to the Los Angeles agent's inspection, with one exception discussed *infra*.

9. TWEAN further argues that its situation is similar to *Tabback Broadcasting Company for Renewal of License of Station KAZM(FM), Sedonia, Arizona* ("Tabback").¹⁸ In *Tabback*, the Commission upheld a Mass Media Bureau ruling that accepted, *inter alia*, the licensee's affirmation that certain required information (issues/programs list) that a complainant charged was missing, was in fact included with the file. We agree that *Tabback* serves as precedent for one of the missing sets of documents in TWEAN's public inspection files. TWEAN has provided evidence that the records pertaining to children's programming were with the public inspection file, but filed out of place due to the recent office move undertaken by the company.¹⁹ As in *Tabback*, we conclude that these files were included with TWEAN's public inspection files, albeit out of place. We will therefore reduce the proposed forfeiture to reflect this conclusion.

10. With regard to the other items, however, we find that their absence from the public inspection file constitutes a willful and repeated violation of Section 76.1700(a) of the Rules. The Los

¹³ TWEAN's move was six weeks prior to the inspection; Declaration by Ann Verwey, an Executive Assistant for TWEAN, dated January 29, 2003, ¶ 2 ("Verwey Declaration.")

¹⁴ *Policy Statement*; Section 1.80 of the Rules; *See also AGM-Nevada, LLC*, 18 FCC Rcd 1476 (Enf. Bur. 2003) (the Commission does not reduce forfeitures for lack of public harm).

¹⁵ 17 FCC Rcd 14604 (Enf. Bur. 2002) ("*Telemedia*").

¹⁶ Verwey Declaration, ¶ 4.

¹⁷ *Id.*, ¶¶ 1, 4.

¹⁸ 15 FCC Rcd 11899 (2000).

¹⁹ Verwey Declaration, ¶ 5.

Angeles Office agent found that TWEAN did not have signal leakage logs and repair records, or the fall (winter) 2001 and spring 2002 proof-of-performance test results, in the public inspection file, and we infer from the language of the Verwey Declaration, as well as from the absence of an affirmative declaration by an officer or ultimately responsible party, that these records were not in the public inspection file, as such, until TWEAN corrected its files after the Los Angeles agent's inspection.

11. TWEAN states that after the inspection, it subsequently located and correctly filed the missing commercial records pertaining to children's programming, the signal leakage logs and repair records, and the spring 2002 proof-of-performance test results. TWEAN states that it has ensured the file now contains the fall 2001 proof-of-performance test results.²⁰ The Commission has consistently found that while commendable, "corrective action taken to come into compliance with Commission rules or policy is expected, and does not nullify or mitigate any prior forfeitures or violations."²¹

12. We have examined TWEAN's response to the *NAL* pursuant to the statutory factors above, and in conjunction with the *Policy Statement* as well. As a result of our review, we conclude that TWEAN willfully and repeatedly violated Section 76.1700(a) of the Rules, but we conclude that a reduction of the forfeiture amount is warranted. We will reduce the ten thousand dollar (\$10,000) monetary forfeiture to six thousand six hundred dollars (\$6,600) because the children's programming records were in fact with the public inspection files, albeit misfiled.

IV. ORDERING CLAUSES

13. Accordingly, **IT IS ORDERED** that, pursuant to Section 503 of the Act, and Sections 0.111, 0.311 and 1.80(f)(4) of the Rules,²² Time Warner Entertainment – Advance/Newhouse Subsidiary, LLC d/b/a Time Warner Cable **IS LIABLE FOR A MONETARY FORFEITURE** in the amount of six thousand six hundred dollars (\$6,600) for willful and repeated violation of Section 76.1700(a) of the Rules.

14. Payment of the forfeiture shall be made in the manner provided for in Section 1.80 of the Rules within 30 days of the release of this *Order*. If the forfeiture is not paid within the period specified, the case may be referred to the Department of Justice for collection pursuant to Section 504(a) of the Act.²³ Payment may be made by mailing a check or similar instrument, payable to the order of the Federal Communications Commission, to the Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482. The payment should reference NAL/Acct. No. 200332900002 and FRN 0007-9355-62. Requests for full payment under an installment plan should be sent to: Chief, Revenue and Receivables Operations Group, 445 12th Street, S.W., Washington, D.C. 20554.²⁴

²⁰ TWEAN also states that some of its previous proof-of-performance test results are missing from its files, and that in spite of its best efforts, cannot be located.

²¹ *Seawest Yacht Brokers*, 9 FCC Rcd 6099 (1994); *AT&T Wireless Services, Inc.*, 17 FCC Rcd 21866, 21871 (2002).

²² 47 C.F.R. §§ 0.111, 0.311, 1.80(f)(4).

²³ 47 U.S.C. § 504(a).

²⁴ *See* 47 C.F.R. § 1.1914.

15. **IT IS FURTHER ORDERED** that a copy of this *Order* shall be sent by first class mail and certified mail, return receipt requested, to TWEAN Subsidiary LLC, 3701 N. Sillect Avenue, Bakersfield, California 93308 and to its counsel, Arthur H. Harding, Esq., Fleischman and Walsh, L.L.P., 1400 Sixteenth Street, NW, Washington DC 20036.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon
Chief, Enforcement Bureau